

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESSIE JETT,

Defendant-Appellant.

UNPUBLISHED

June 19, 2003

No. 236992

Wayne Circuit Court

LC No. 00-008991

Before: Griffin, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to forty to eighty years in prison for the murder conviction, and two years in prison for the felony-firearm conviction. We affirm.

Defendant's first argument on appeal is that the trial court erred in denying his request to instruct the jury on voluntary manslaughter. We disagree. This Court reviews claims of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Kris Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). We find it unnecessary to determine whether the Michigan Supreme Court's recent decision in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), requires us to find that no instruction on voluntary manslaughter could be given under MCL 768.32(1). It is unnecessary because assuming that a voluntary manslaughter instruction was permissible under MCL 768.32(1), the evidence did not support such an instruction.

Voluntary manslaughter is a cognate lesser included offense of murder. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991); *People v Heflin*, 434 Mich 482, 497; 456 NW2d 10 (1990); *People v Cheeks*, 216 Mich App 470, 479; 549 NW2d 584 (1996). To establish voluntary manslaughter, it must be shown that defendant intentionally killed the victim in the heat of passion, and that the passion was caused by an adequate provocation. *Pouncey*, *supra* at 388. The provocation must be adequate, namely, that which would cause the reasonable person to lose control. *Id.* at 389. Assuming that a cognate lesser included offense could be considered, the test to determine if an instruction should be given is whether there is sufficient evidence in the record to support a conviction on the lesser offense, not simply a modicum of evidence. *Id.* at 387. Here, there was insufficient evidence that defendant was acting in the heat

of passion caused by adequate provocation to the degree that defendant lost control. On the contrary, defendant testified that he shot the victim in self-defense. Defendant's "adequate provocation" argument essentially mirrors the self-defense argument; however, the jury rejected the self-defense argument. Thus, we conclude that even if the jury were instructed on voluntary manslaughter, it would have rejected the "adequate provocation" argument and convicted defendant of second-degree murder, making any error harmless. MCL 769.26. With respect to defendant's argument that a voluntary manslaughter instruction was proper based on imperfect self-defense, defendant's own testimony conflicted with this position. Imperfect self-defense applies only where a defendant would otherwise have been entitled to a self-defense claim had the defendant not been the initial aggressor. *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). Defendant testified that he was not the initial aggressor. Reversal is not warranted.

Defendant's next argument on appeal is that the trial court abused its discretion in ruling that the proposed testimony concerning the victim's reputation for violence within his family was not relevant. Defendant further contends that the exclusion of the proposed testimony was contrary to the rules of evidence and interfered with his constitutional right to present a defense. We disagree.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). However, a decision regarding the admission of evidence frequently involves preliminary questions of law, e.g., whether a rule of evidence precludes admissibility, and questions of law are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A court abuses its discretion only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). This Court also reviews de novo the constitutional issue whether a defendant was denied his constitutional right to present a defense. *Kurr, supra* at 327.

MRE 404 provides, in relevant part:

(a) Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

* * *

(2) When self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by an accused, or evidence offered by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a charge of homicide to rebut evidence that the alleged victim was the first aggressor[.]

In practice, MRE 404(a)(2) has been interpreted as permitting evidence of a victim's reputation for violence to be admitted for two purposes: (1) as circumstantial evidence on the question of which party was the aggressor in the affray, and (2) as circumstantial evidence on the

question of the defendant's state of mind during the affray. *People v Harris*, 458 Mich 310, 315-317; 583 NW2d 680 (1998); *People v Cooper*, 73 Mich App 660, 664; 252 NW2d 564 (1977).

The record indicates that on cross-examination, defense counsel attempted to ask defendant's aunt, who is also the victim's cousin, about the victim's reputation within the family, to which the prosecutor objected. The court then asked defense counsel his purpose for asking the question. In response, defense counsel stated that "it's to show under rules of law, especially in terms of self-defense, someone's general reputation is admissible." Although defense counsel's response was not artfully stated, we find it sufficient to preserve the issue for appeal. However, assuming error in the trial court's ruling, any error was harmless.

The record indicates that after the court sustained the prosecutor's objection, defense counsel then asked the witness whether she had testified on direct examination that the victim had a hot temper, to which she responded in the affirmative. The witness further testified that she had personally witnessed occasions when the victim had lost his temper, and explained how, on one occasion, she had been present at the victim's mother's house when the victim threatened his mother's life while armed with a knife. Moreover, defendant himself was able to testify regarding several violent acts committed by the victim of which defendant had personal knowledge, including hitting defendant's cousin's female friend in the head with a lamp, "pistol whipping" his sister, setting fire to an ex-girlfriend's house while the house was occupied, and stabbing defendant's brother the day before the shooting. Because defendant was able to present evidence of the victim's violent behavior despite the court's decision not to allow evidence of the victim's reputation within the family, any error was harmless as defendant suffered no prejudice. MCL 769.26; *Lukity, supra* at 495-496.

Defendant's next argument on appeal is that the trial court erred in refusing to instruct the jury regarding the defense of others, and in doing so, it denied defendant his right to present a defense. Because the record clearly indicates that the court did in fact instruct the jury regarding the defense of others, defendant's argument is without merit.

Defendant's next argument on appeal is that the trial court erred in admitting evidence of defendant's prior conviction to impeach his credibility because it was overly prejudicial, and admitting the evidence denied him of his right to a fair trial. Generally, the admission of impeachment evidence by prior convictions is reviewed for an abuse of discretion. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). Further, even where the introduction of evidence of a prior conviction is improper, preserved nonconstitutional error is harmless unless defendant demonstrates that it is more probable than not that the error is outcome determinative. *Lukity, supra* at 495-496.

Defendant's argument appears to be based on MRE 609, which provides that evidence of a prior conviction may be admissible for impeachment purposes if it is an offense involving dishonesty or a false statement, or, after a balancing test, in the case of an offense involving theft. MRE 609(a); *People v Parcha*, 227 Mich App 236, 244-246; 575 NW2d 316 (1997). However, we note that MRE 609 is not the only evidentiary basis for prior conviction evidence, but rather, MRE 609 only applies to general impeachment evidence. *People v Taylor*, 422 Mich 407, 414; 373 NW2d 579 (1985). Evidence of prior convictions may still be admissible for other purposes, such as to rebut specific statements of a defendant who testifies at a trial. *Id.* When

offered for the narrow purpose of rebutting specific testimony rather than to attack credibility in general, MRE 609 is inapplicable. *Id.* at 417.

A review of the record reveals that during the cross-examination of defendant, but outside the presence of the jury, the prosecutor sought permission from the court to introduce evidence that defendant was a convicted felon. Defendant had served one to five years in prison for attempted delivery of a controlled substance less than fifty grams, and was discharged on January 26, 1990. The prosecutor's basis for the request was that defendant was repeatedly testifying, both on direct and cross-examination, that his fear of turning himself in stemmed solely from the fact that he was in possession of an unlicensed weapon. The trial court ruled that because defendant was attempting to portray himself as a law abiding citizen bereft of fear, who carried a loaded gun around solely for self protection, and that the lack of a gun permit was the only illegality that prevented him from turning himself in, it would allow the admission of defendant's prior conviction to refute defendant's testimony.

We hold that the trial court did not abuse its discretion when it allowed the prosecutor to refute defendant's testimony that the only illegality associated with him carrying a weapon was that the gun was unlicensed. Defendant attempted to mislead the jury to believe that he had never been in trouble with the law, and had no other reason for not turning himself in, when in fact, that was not true. Defendant opened the door to the prosecutor's questioning. Therefore, evidence of defendant's prior conviction was admissible to refute defendant's testimony even though such evidence would not have been admissible under MRE 609 to generally impeach defendant's credibility. Thus, the trial court did not abuse its discretion in admitting the evidence, and defendant's constitutional rights were protected.

Defendant's next argument on appeal is that the trial court erred in denying his motion for a mistrial after prosecution witness detective Ubaldo Rios impermissibly testified that defendant was stopped after leaving a location which was under surveillance for narcotics. We disagree.

This Court reviews a trial court's decision to grant or deny a mistrial for an abuse of discretion. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000). A motion for mistrial should be granted only if there is an irregularity that is prejudicial to the defendant's rights and impairs his ability to receive a fair trial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Generally, "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *Id.*

The record indicates that prior to Rios even taking the stand, defense counsel expressed concern that Rios would get on the stand and testify to matters beyond defendant's arrest, such as narcotics, a large sum of money, and firearms being found on defendant at the time of his arrest. The prosecutor assured the court that he was not going to elicit any testimony from Rios regarding any of those matters. During direct-examination of Rios, the prosecutor asked him, "At some point did you have a closer contact with [defendant] other than by surveillance?" After answering the prosecutor's question in the affirmative, Rios decided to expand upon his answer by explaining that a search warrant for narcotics had been obtained for a residence, from which defendant had been leaving when he was stopped by Rios. We conclude that the prosecutor's question was proper and was not designed to elicit the testimony given by Rios. Instead, Rios volunteered his answer, which was unresponsive to the question. Thus, statement regarding the

involvement of narcotics was not grounds for granting a mistrial. *Haywood, supra* at 228. Moreover, defendant has not shown that he suffered prejudice because of Rios' statement such that it would warrant a mistrial, and we conclude from a review of the record that defendant received a fair trial. Therefore, the trial court did not abuse its discretion in denying the motion for a mistrial.

Defendant's next argument on appeal is that the trial court erred in denying his motion for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). To determine whether the trial court erred in denying the motion for a *Ginther* hearing, we must review the grounds on which defendant claims his trial counsel was ineffective.

Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v Leblanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). While a trial court's findings of fact are reviewed for clear error, questions of constitutional law are reviewed by this Court de novo. *Id.* In order for a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To prove deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To prove prejudice, a defendant must affirmatively demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 302-303.

Defendant contends that he was denied the effective assistance of counsel by defense counsel's (1) failure to object to several improper acts by the prosecutor, (2) failure to present the defense of imperfect self-defense, and (3) failure to obtain a cautionary instruction after defendant's motion for mistrial was denied and again when the jury was informed that defendant was a convicted felon. Defendant asserts that the record is incomplete and requests that this Court remand the case to the trial court for a full evidentiary hearing so defense counsel can explain whether the challenged conduct was sound trial strategy, or admit that his conduct amounted to a mistake of such magnitude that defendant was deprived of a fair trial.

The record indicates that the trial court considered defendant's request for a *Ginther* hearing, and denied it without stating any specific reasons for the denial on the record. However, we note that the absence of an evidentiary hearing is not fatal to a defendant's claim of ineffective assistance of counsel where the details of the alleged deficiencies are sufficiently contained in the record as to permit this Court to reach and decide the issue. *People v Kenneth Johnson*, 144 Mich App 125, 129; 373 NW2d 263 (1985). In this instance, the alleged errors are apparent from the record, and the record is sufficient for review. Therefore, the trial court did not err in denying defendant's request for an evidentiary hearing.

Defense counsel's performance must be evaluated against an objective standard of reasonableness without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Furthermore, effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court will not substitute its judgment for that of counsel regarding matters of

trial strategy, and ineffective assistance of counsel cannot be found merely because a certain trial strategy backfired. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

We reject defendant's claim that his trial counsel was ineffective because he failed to object to several instances of prosecutorial misconduct. More specifically, defendant argues that counsel should have objected to the prosecutor's (1) denigration of the defense by calling it "balderdash," "bunk," and "the defense of last resort" and stating that the defense witness was lying; (2) direct comments, insinuations, questions to witnesses, and arguments that the defense was fabricated; (3) misrepresentation of the evidence in his arguments; (4) misstatement of the law regarding self-defense; (5) improper expression of personal belief regarding the truthfulness of witnesses' testimony; (6) improper attack of witnesses; (7) urging of the jury to consider matters outside the issues of guilt or innocence; and (8) bolstering of admittedly perjured testimony. Many of the prosecutor's comments were supported by the evidence, and even if an objection to some of the prosecutor's remarks would have been appropriate, we cannot say that counsel's failure to object amounted to deficient performance of trial counsel. "[T]here are times when it is better not to object and to draw attention to an improper argument." *People v Ullah*, 216 Mich App 669, 685; 550 NW2d 568 (1996). We conclude that defendant has not overcome the presumption of sound trial strategy. *Toma, supra* at 302. Nor has defendant shown a reasonable probability that, but for counsel's alleged error, the result of the trial would have been different. *Id.* at 302-303.

Defendant's argument, that trial counsel's assistance was ineffective because he failed to present the doctrine of imperfect self-defense, is also without merit. As noted above, imperfect self-defense applies only where a defendant would otherwise have been entitled to a self-defense claim had the defendant not been the initial aggressor. *Butler, supra* at 67. Defendant was not entitled to an instruction on imperfect self-defense. Defendant pursued a theory of self-defense in which the victim was the aggressor. Defendant testified that he was seeking to resolve the dispute, and opened fire only after seeing the victim pull out his gun. Fearing for his own life, and the lives of his aunt and cousin, defendant pulled his own gun from his car and shot the victim. Defendant's theory of self-defense was that the victim was the aggressor. It is not consistent with a theory of imperfect self-defense in which the defendant is the aggressor. *Butler, supra* at 67. Therefore, counsel was not ineffective for failing to present the defense or request the instruction.

Finally, defendant's ineffective assistance claim, based on counsel's failure to obtain a cautionary instruction after his motion for mistrial was denied and again when evidence of defendant's prior conviction was admitted, is also unpersuasive. Here, trial counsel may have decided that a cautionary instruction regarding Rios' unsolicited statement about narcotics at the end of trial would have necessarily reminded the jury of the testimony and may have given them reason to believe that defendant was involved in illegal drug activity. Similarly, trial counsel may have also decided that a cautionary instruction during defendant's testimony would have emphasized the prior conviction. It is conceivable that defense counsel decided it was best to let it go, rather than have the trial court offer the jury a reminder of testimony that was not beneficial to defendant. Because the record reveals possible strategical reasons for not requesting cautionary instructions, we hold that defendant was not denied the effective assistance of counsel. Furthermore, the instructions did not pertain to basic and controlling issues in the

case and cautionary instructions, although advisable, are not mandatory. *People v Ortiz*, 249 Mich App 297, 312; 642 NW2d 417 (2002).

Defendant's final argument on appeal is that his sentence for second-degree murder should be vacated because the trial court erred in failing to articulate sufficient reasons for its substantial upward departure from the sentencing guidelines range. We disagree.

The offenses for which defendant was convicted and sentenced were committed in 1994. Because the offenses occurred before January 1, 1999, the judicial sentencing guidelines apply. MCL 769.34(1). Generally, this Court reviews a trial court's decision to depart upward from the sentencing guidelines for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636, 657 n 25; 461 NW2d 1 (1990). A trial court sentencing a defendant under the judicial guidelines abuses its discretion if it violates the principle of proportionality. *Id.* at 636. This principle is violated if the sentence is not proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* The crucial test for proportionality is not whether the sentence departs from, or adheres to, the recommended range under the sentencing guidelines, but whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). A court upwardly departing from the sentencing guidelines must place its reasons for doing so on the record at the time of sentencing. *People v Fleming*, 428 Mich 408, 417-418; 410 NW2d 266 (1987). A court may justify an upward departure by reference to factors considered, but adjudged inadequately weighed, within the guidelines, as well as by introducing legitimate factors not considered by the guidelines. See *People v Granderson*, 212 Mich App 673, 680-681; 538 NW2d 471 (1995). Additionally, a court may consider, as an aggravating factor, that a defendant's actions reflected a more serious crime where that determination is supported by a preponderance of the evidence. *People v Coulter (After Remand)*, 205 Mich App 453, 456-457; 517 NW2d 827 (1994).

In the instant case, the sentencing information report prepared on defendant's behalf indicated a recommended sentencing guidelines range of 120 to 300 months' imprisonment for the second-degree murder conviction. The court sentenced defendant to a minimum term of 480 months, and explained that the reason for its upward departure from the guidelines range was because of defendant's reckless endangerment of two toddlers who were standing nearby when defendant opened fire. In addition, during the hearing on defendant's motion for resentencing, the court explained that it had also considered the fact that defendant had absconded from Michigan for 6 ½ years after the shooting having in his mind a valid claim of self defense. The trial court noted that by defendant's own admission, he raised his gun over the hood of his car and fired in the direction of the victim, who was standing in front of his apartment. Other testimony revealed that there were two young children in that apartment when defendant opened fire in that direction, and at least one of those children was standing near the door in front of which the victim was shot. Defendant also admitted that he left Michigan and moved to Georgia shortly after the shooting. The trial court also indicated that defendant's testimony, in relation to the self-defense claim, was incredible. Based on the record, we hold that the presence of small children at the time of this shooting and defendant's flight to Georgia for six years after the shooting were legitimate factors not considered by the guidelines, as well as aggravating factors that the court could permissibly consider, along with trial testimony, to support its apparent belief that defendant's actions reflected a more serious crime. Such a belief was supported by the preponderance of the evidence. *Coulter, supra* at 456-457. Therefore, the trial court

appropriately departed from the guidelines and defendant's sentence does not violate the principle of proportionality; there was no abuse of discretion.¹

Affirmed.

/s/ Richard Allen Griffin

/s/ William B. Murphy

/s/ Kathleen Jansen

¹ We reject defendant's argument that he was entitled to be present at the motion for resentencing, where he had the opportunity to allocute at sentencing, and where defendant fails to supply any legal authority in support of his position.